No. 14751

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TONY STARKOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Jurisdiction was conferred on the United States District Court by Section 3231, Title 18, U. S. C. Jurisdiction for this appeal is conferred by Section 1291, Title 28, U. S. C.

STATUTE INVOLVED

Section 192, Title 2, U. S. C. provides that:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisoned in a common jail for not less than one month nor more than twelve months."

QUESTIONS PRESENTED

(While the appellant raised eight points to be relied upon in appeal in his Statements of Points to Be Relied Upon in Appeal, he now raises only the following question:)

1. Whether the appellant validly asserted his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States in response to the question asked of him by the subcommittee.

STATEMENT OF CASE

On June 16, 1954, at Seattle, Washington, the appellant appeared as a witnes before the subcommittee of the Committee on Un-American Activities of the House

of Representatives. The subcommittee was investigating the extent and nature of Communist Party activity in Seattle. Before the appellant appeared as a witness, he had been named by another witness as having been a member of the Communist Party.

The appellant was asked various questions by the subcommittee. Among these questions was the following: "How soon after that (referring to the period in which he lived in Bellingham) was it that you moved to Seattle?" The appellant refused to answer this question, invoking his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. For this and other refusals to answer, appellant was indicted and tried on five counts of violation of Section 192, Title 2, U. S. C. and on one count of violation of Section 1505, Title 18, U.S.C. All counts but the one based on the question above were dismissed by the Court below.

The Court below ruled that there was nothing about the question, or about the surrounding circumstances, to indicate that an answer to the question would have incriminated the appellant, or would have afforded a link of any kind in a criminal prosecution.

The Court then ruled, as a matter of law, that the appellent's answer to the question was not privileged

under the Fifth Amendment, and the jury convicted him for his refusal to answer. Notice of appeal was duly and timely filed in this Court.

SPECIFICATION OF ERRORS

1.

The Court below erred in ruling that there was nothing about the question to indicate that an answer thereto would have incriminated him directly or indirectly, or would have afforded a link of any kind in a criminal prosecution.

2.

The Court below erred in ruling that appellant's answer to the question was not privileged under the Fifth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

The appellant validly asserted the privilege against self-incrimination under the Fifth Amendment. Under the circumstances and in the setting in which the question was asked, in view of the admitted purpose of the question, in view of the subject matter that the subcommittee was investigating and in view of what preceded the asking of the question (see ARGUMENT below), the appellant had reasonable grounds to apprehend that an answer to the question would tend to incriminate him. Specifically, he had reasonable grounds

to apprehend that an answer to the question might have afforded an important link in a chain of evidence to convict appellant of a violation of a Federal criminal statute, the Smith Act.

ARGUMENT

To determine whether the privilege was properly invoked, the setting in which this question was asked must be considered. The privilege of the Fifth Amendment may not be destroyed by singling out one question and claiming that question itself did not seek self-incriminating evidence. It is established that where a series of questions constitute part of a single line of inquiry, the availability of the privilege against all questions is determined by the general nature of the line of inquiry. "We are to take the question," said Judge Learned Hand in *U. S. v. Weissman*, 111 Fed. 2d 265, "in its setting including the other questions and the information of which we may reasonably infer the prosecution has possession."

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States,* 341 U.S. 479, at page 486. In *United States v. Burr,* 25 Fed. Cas.

40, No. 14, 692 (e), Chief Justice Marshall had enunciated a similar test: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish *any one* of them against himself." The rules enunciated by the *Hoffman* and *Burr* cases were expressly adopted and approved by the Supreme Court in the recent case of *Emspak v. United States,* 349 U.S. 190, decided May 23, 1955.

What was the setting—as established by the record—in which the question was asked in the instant case? Prior to the appellant's appearance as a witness before the subcommittee, the appellant had been identified by another witness as a member of the Communist Party. (Transcript of Proceedings, P. 14).

According to the witness for the appellee, Mr. Travenner, counsel for the subcommittee, the subcommittee was investigating Communist Party activity in the Seattle area. (Tr. 18, 34). And all questions asked of appellant were directed towards this single line of inquiry. The stated purpose of the particular question was two-fold: to ascertain when the appellant lived in Seattle in order to determine what *knowledge* he had of Communist Party activity and influence in that area (Tr. 18); and to identify the appellant as the George Starkovich previously named as a Communist

(Tr. 14). Mr. Tavenner testified in the trial below, and was specific about it, that the subcommittee was, in interrogating the appellant, seeking to learn what he knew of Communist Party activity in Seattle (Tr. 31). The appellant told the subcommittee that he lived in Bellingham in 1950 (Tr. 18), but the subcommittee was interested in Communist activity, *not* in Bellingham, but in Seattle (Tr. 31). It was, therefore, the obvious and stated purpose of the question, to locate the appellant in Seattle so as to establish whether he had knowledge of Communist activity in Seattle.

In view of the foregoing setting, it is obvious—in light of the recent *Emspak* holding—that for appellant to answer this question, he would have afforded his questioners a substantial link in a chain of evidence necessary to convict appellant of a violation of the Smith Act, under which membership in the Communist Party is a vital, almost conclusive, element. For appellant to have answered that he moved to Seattle and to pin-point the date of his moving might also have substantiated the charge previously made by the witness who had named appellant as a Communist, since there was some question as to whether appellant was the same person so named as a Communist.

The "link in the chain" is obvious. For appellant to testify that he did move to Seattle on a particular date then establishes the possibility that appellant had

knowledge of Communist activity in Seattle—and knowledge of such activity was just what the subcommittee was inquiring about.

In the *Hoffman* case, supra, the Supreme Court emphasized the necessity both for excluding all possibility of incrimination and for taking into account all the circumstances before a claim of privilege is denied. It held that such a claim must be respected unless it is "not *perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have such tendency to incriminate." (Italics in original.)

Upon the foregoing principles, it is now conclusively established that answers are privilege concerning Communist membership, activity, affiliation or association with the Communist Party. (*Blau v. United States,* 340 U.S. 159). Even before the *Blau* case, it was similarly well established that the privilege supports a refusal to testify as to attendance at Communist Party meetings, *knowledge* of its affairs, and acquaintance with persons thought to be Communists (*Alexander v. United States,* 181 Fed. 2d 480; *Kasinowitz v. United States,* 181 Fed. 2d 632).

The question, then, was asked the appellant in the instant case, being so directly linked with *knowledge* of Communist Party affairs and activities, it seems clear than an answer to the question—in the words of

the *Hoffman* case (supra)—"might be dangerous because injurious disclosure could result."

If there was any doubt about the principle of the privilege against self-incrimination, and when it can be validly invoked, these doubts have been erased by the recent holdings in the *Emspak* case (supra) and in *Quinn v. United States,* 349 U.S. 155, decided the same day. In the *Emspak* case, the Court reversed a conviction for refusal to answer some 58 questions concerning Emspak's associations posed to petitioner by a subcommittee such as interrogated appellant in the instant case. Chief Justice Warren, writing the majority opinion, followed the principles in *Hoffman, Burr, Alexander* and *Kasinowitz.* The Court said, "If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any inference of guilt."

Of particular significance in *Emspak* is the dissenting opinion of Mr. Justice Harlan who vigorously opposed the majority on the question of reasonable apprehension. His very dissent indicates the broad scope of the majority decision in determining whether the answer to a particular question might be incriminatory. But more important is Harlan's definition of the problem as he saw it. "What I do submit is that the privilege should not be available when the facts have been

sufficiently developed at the time the claim of privilege is made so that it is plain that no possible answer to the question put to the witness could rationally tend to prove his guilt or supply the prosecution with *leads* to evidence against him." (Italics mine.) Even under Harlan's definition, I submit that the decision of the lower Court should be reversed. For there can hardly be any doubt but that any answer to the question as to when appellant moved to Seattle would supply the prosecution with a *"lead* to evidence against him." No further evidence concerning reasonable apprehension was necessary since the burden was on the prosecution to prove than an answer could not have possibly incriminated him, and that the prosecution did not do.

The trial judge below should have ruled, as a matter of law, that under the circumstances described above, the appellant had reasonable apprehension that a response to the question might tend to incriminate him, and therefore, that he had validly invoked the Fifth Amendment. The Court should have dismissed that count of the indictment based on the said question.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the Court below be reversed.

Respectfully submitted,

JAY G. SYKES
Attorney for Appellant.